No. 85-589

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

GUS HALL, et al.,

Petitioners,

v.

EDWIN J. SIMCOX, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

1. Whether a State may constitutionally amend its election law by arbitrarily quadrupling the number of signatures required for ballot access, where there is no compelling state interest for any change, and where there has been no consideration given to less burdensome means of achieving the State's objective, when the effect of such amendment is to severely burden the achievement of ballot status by third parties and independent candidates.*

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* In addition to the parties in the caption, the other parties in the Court of Appeals were as follows:

Plaintiffs-Appellants: Angela Y. Davis; Communist Party, U.S.A.; Joseph Norrick; Roscoe Proctor; and Michael Bayer.

Defendants-Appellees: Laurie Potter Christie, in her official capacity as Executive Director of the Indiana State Election Board; and Donald B. Cox and Melvin Reed, in their official capacities as members of the Indiana State Election Board.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Plaintiffs below respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is published at 766 F.2d 1171 (1985), and appears in Appendix ("App.") A. The Court of Appeals' judgment appears in App. B. The opinion of the United States District Court for the Southern District of Indiana is unreported, and appears in App. C.

JURISDICTION

The judgment of the Court of Appeals was entered on July 11, 1985. App. B. Jurisdiction is conferred by 28 U.S.C. §1254(1).

STATUTES INVOLVED

This case concerns the provisions of Indiana Code Sec. 3-1-11-1, as amended (hereinafter "I.C. 3-1-11-1"). For the Court's convenience, that statute is set forth in App. D.

STATEMENT OF THE CASE

1. *Background*

Plaintiffs Gus Hall and Angela Y. Davis (collectively referred to as the "Candidates") were candidates for President and Vice President of the United States at the 1984 General Election. They appeared on the ballot in 22 states and the District of Columbia on election day, November 6, 1984.

The Candidates sought to appear on the general election ballot in the State of Indiana as candidates of the Communist Party, U.S.A., a party not qualified under Indiana law to nominate candidates in a primary, by convention, or by certificate of nomination. To appear on the ballot, the Candidates were required to comply with the provisions of I.C. 3-1-11-1 (App. D) which mandate the submission of nomination papers (referred to herein as the "petitions") in specified form and signed by registered voters in Indiana. On or about April 2, 1984, supporters of the Candidates began circulating petitions and soliciting signatures of registered voters upon the petitions.

Because Indiana has no provision permitting write-in votes for President and Vice President, the submission of petitions was not only the sole means of ballot access for the Candidates (or any independent candidates or candidates of a new political party), but was also essential in order to allow members of the electorate to cast their ballot for the Candidates. Unlike the situation in many states where write-in votes are permitted, Indiana voters

who wished to vote for the Candidates would be totally disenfranchised if they did not appear on the ballot.

Plaintiffs Norrick, Bayer and Proctor are registered voters in Indiana and were duly qualified to vote at the 1984 general election. Norrick appeared as a presidential elector candidate on the petitions and Proctor was actively involved in soliciting signatures. Bayer sought to cast his vote for the Candidates on election day.

Prior to January 1, 1983, the provisions of I.C. 3-1-11-1 required that in order to achieve ballot access, candidates for offices for which all of the State's voters are entitled to vote submit petitions containing signatures of at least one-half of one percent (½%) of the total vote cast for Secretary of State at the last preceding general election. On March 3, 1980, the Indiana General Assembly, by Public Law No. 6, quadrupled the number of signatures required, to a minimum of two percent (2%) of the vote for Secretary of State, a four-fold increase (from approximately 8,700 signatures in 1980, to approximately 35,000 signatures in 1984). The effective date of the amendment was January 1, 1983.

The Candidates and their supporters submitted sufficient certified signatures of registered voters to qualify for ballot access under the statute prior to its amendment. Because they did not comply with the new 2% requirement, however, they were denied ballot access.

2. *The Proceedings below*

Plaintiffs commenced this action for declaratory and injunctive relief in the District Court, contending that the arbitrary quadrupling of the signature requirement was unconstitutional under the First and Fourteenth Amendments. The District Court entered judgment for the defendants and dismissed the complaint, and the Court of Appeals affirmed.

REASONS WHY THE WRIT SHOULD ISSUE

THE COURT OF APPEALS HAS MISINTERPRETED THE DECISIONS OF THIS COURT WITH RESPECT TO THE STANDARD TO BE USED TO EVALUATE RESTRICTIONS UPON FUNDAMENTAL RIGHTS OF VOTING AND ASSOCIATION

A. The Right to Ballot Status is Among the Most Precious Constitutional Rights. The Quadrupling of the Signature Requirement Severely Increases the Burden on the Achievement of this Right

The right to vote and to associate freely in furtherance or pursuit of political beliefs, as individuals and in concert with others, are basic rights guaranteed by the First and Fourteenth Amendments. See, e.g. *Williams v. Rhodes*, 393 U.S. 23 (1968); *Bullock v. Carter*, 405 U.S. 134 (1972); *Lubin v. Panish*, 415 U.S. 709 (1974). These rights are of the most fundamental significance under our constitutional structure. Indeed, as Mr. Justice Black wrote in *Williams v. Rhodes, supra*:

> "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." 393 U.S. at 31.

Ballot access restrictions and candidate eligibility requirements also have an impact on the rights of voters because absent recourse to referendums, "voters can assert their preferences only through candidates or parties or both." *Lubin v. Panish, supra* at 716. "...[T]he rights of voters and candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters." *Bullock v. Carter, supra* at 143. "The exclusion of candidates also burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying-point for like-minded

citizens." *Anderson v. Celebrezze*, 460 U.S. 780, 787-88 (1983). As this Court noted in *Williams, supra* at 30:

> "In the present situation the state laws place burdens on two different, although overlapping, kinds of rights - the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms."

Obviously, Indiana's four-fold increase in the number of signatures required for ballot access places a heavy additional burden on the exercise of what "rank among our most precious freedoms." Moreover, the lack of a write-in alternative means that Indiana voters who are unable to place the candidate(s) of their choice on the ballot are completely disenfranchised.

B. To Justify the Heavy Additional Burden Which the Four-Fold Increase in the Signature Requirement Places on the Right to Ballot Status, the State Must Establish That Its Classification is Necessary to Serve a Compelling State Interest

While a state has a substantial interest in regulating the electoral process and ensuring fairness and order, and may therefore enact "reasonable, nondiscriminatory regulations," *Anderson v. Celebrezze, supra* at 788, there must be a careful balancing between the state's legitimate interest and the adverse impact upon the rights of candidates and voters. "When such vital individual rights are at stake, a State must establish that its classification is necessary to serve a compelling state interest." *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) (citations omitted).

Undoubtedly, the State of Indiana has an important state interest in requiring that a potential candidate demonstrate a "significant modicum of support" before inclusion on the ballot. *Jenness v. Fortson*, 403 U.S. 431, 442 (1971); *Bullock v. Carter, supra*. Under specific circumstances, in *Jenness* as well as in other

cases, numerical requirements greater than the 2% challenged here have been sustained. However, those cases were decided upon facts that were significantly different from those of this case, and, even when a statute has been upheld, the Court has never done so based upon a purely mathematical computation of the number of signatures required, but rather upon a careful balancing of the state's interest and the burden placed upon the electorate, the candidates and their supporters. Because of the critical nature of the First Amendment rights involved, and given that "in the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest,"[1] *Anderson v. Celebrezze, supra* at 794-95, even when it is pursuing a legitimate interest,

> "a State may not choose means that unnecessarily restrict constitutionally protected liberty... and we have required that States adopt the least drastic means to achieve their ends... This requirement is particularly important where restrictions on access to the ballot are involved. The States' interest in screening out frivolous candidates must be considered in light of the significant role that third parties have played in the political development of the Nation... Overbroad restrictions on ballot access jeopardize this form of political expression." *Illinois State Board of Elections v. Socialist Workers Party, supra* at 185-86 (citations omitted).

As a result, the Court has set forth a method of analysis for evaluating the validity of a specific statute and has made it abundantly clear that a purely mathematical analysis is insufficient with respect to signature requirements:

> "... the rule fashioned by the Court to pass on constitutional challenges to specific provisions of election laws provides no litmus-paper test for separating those

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[1] In this case, as in *Anderson*, Indiana's quadrupling of the signature requirement "does more than burden the associational rights of independent voters and candidates. It places a significant state-imposed restriction on a nationwide electoral process." *Anderson v. Celebrezze, supra* at 795.

> restrictions that are valid from those that are invidious under the Equal Protection Clause. The rule is not self-executing and is no substitute for the hard judgments that must be made. Decision in this context, as in others, is very much a "matter of degree," very much a matter of "consider[ing] the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification." What the result of this process will be in any specific case may be very difficult to predict with great assurance." *Storer v. Brown*, 415 U.S. 724, 730 (1974).

This point was reaffirmed by the Court in 1983 when it considered the challenge by John Anderson to Ohio's early filing deadline:

> "...a Court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It must then identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. in passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests *make it necessary* to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is constitutional." *Anderson v. Celebrezze, supra* at 789 (emphasis added).

C. The Court of Appeals Expressed Uncertainty About the Standard Prescribed by the Supreme Court and Acknowledged That if a Strict Standard Were Applied, the Signature Increase Could Not Be Sustained

An examination of the opinion of the Court of Appeals reveals that it failed to apply appropriate standards in its evaluation of the challenged statute. It not only expressed uncertainty about the applicable standard, but also attributed this lack of clarity to the U.S. Supreme Court:

> " ...the [U.S. Supreme] Court has not settled on the standard to be applied in ruling on such challenges... The uncertainty about the standard for judging such restrictions has been noted by the Fifth Circuit in *Dart v. Brown*, 717 F.2d 1491, 1501-02 (Fifth Cir. 1983), and by several commentators. See, e.g., Tribe, American Constitutional Law 783 (1978); Case comment, 18 Suffolk U.L. Rev. 24, 30 (1984)." 766 F.2d at 1173.

The Court also noted that "[w]e must follow what the Supreme Court does, and not just what it says, especially when what it says is not altogether consistent from case to case." 766 F.2d at 1174.

It appears that the Court of Appeals actually evaluated the statute by a vague standard of "reasonableness," since it noted that "[t]he courts may sometimes talk the language of least drastic means but they only strike down ballot access restrictions that are unreasonable, such as Ohio's 15 percent requirement in *Williams v. Rhodes*." 766 F.2d at 1176.

The "reasonableness" test is clearly inappropriate and in conflict with the standard prescribed by this Court. By contrast, in two recent cases the Ninth Circuit and the Eleventh Circuit have applied the *Anderson* analysis and required a compelling state interest to sustain the challenged statutory provisions. *Socialist Workers Party v. Secretary of State of Washington*, 765 F.2d 1417 (9th Cir., July 17, 1985); *Bergland v. Harris*, 767 F.2d 1551 (11th

Cir., Aug. 12, 1985). In *Socialist Workers Party*, the State of Washington had amended its election law by requiring that after nomination by the "convention-certificate" process, minor party candidates receive 1% of the vote at the primary election in order to appear on the general election ballot. Previously, the nominee of a minor party had been placed directly on the general election ballot. The Court evaluated the interests offered by the State to justify the amendment and concluded that there had been no problem with overcrowding of the general election ballot, and thus no justification for the more severe burden placed upon minority parties who wished to place their candidates on the ballot. As a result, the statute was declared unconstitutional.

The approach of the Seventh Circuit in the instant case is clearly the antithesis of that used by the Ninth and Eleventh Circuits in *Socialist Workers Party* and *Bergland*. The significance of this is underscored by the Seventh Circuit's admission that "[i]f a strict standard were to be applied to this case, Indiana would be in trouble. While it certainly has an interest in limiting the length of the ballot in order to prevent confusion of voters, it has not shown that the protection of this interest required it to raise the petition requirement from .5 to 2 percent." 766 F.2d at 1173.

Moreover, the perception by the Seventh Circuit, and other courts and commentators, that the Supreme Court has rendered inconsistent decisions in this field, has in turn led to inconsistent decisions by the Courts of Appeals, with a resulting detrimental effect upon the courts, the legislatures and the electorate. The importance of this cannot be overstated, since the issues involved touch upon our most fundamental freedoms, resulting in extensive and frequent litigation in the field. In addition to the myriad of questions that arise concerning ballot access, where the same method of review must be utilized, the precise issue presented by this case is likely to arise in other states. For example, since the last Presidential election, North Dakota has passed a bill raising the number of signatures required for the office of President from 1,000 to 4,000 (an earlier version of the bill had raised the figure to 7,000).

In fact, Indiana's quadrupling of the signature requirement cannot withstand the level of scrutiny required by applicable decisions of this Court. As the Court of Appeals noted, Indiana had no justification for its drastic increase in the signature requirement; its action was completely arbitrary, and totally unnecessary.[2] And the effect of its action was to prevent a single new party or independent candidate from achieving ballot status through the petition process in the 1984 Presidential election. The only Presidential candidates who appeared on the Indiana ballot last year were those whose parties had qualified by receiving a specified number of votes for the office of Secretary of State at the 1982 election. If not for a quirk in the interpretation of the amended statute,[3] only the Republican and Democratic Parties would have appeared on the 1984 Presidential ballot. The Court of Appeals was cognizant of this danger and warned that "[i]f the 1984 election can be considered representative in this regard — and only time will tell — the new law will eliminate all minor parties from the presidential ballot... Since Indiana does not permit write-ins, the ballot as a method of expressing political views may be completely closed to minor parties in Indiana." 766 F.2d at 1173.

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[2] The Court of Appeals admitted that " ... to go from .5 percent all the way to 2 percent in one jump was abrupt, and seems to have brought the number of candidates well below the level that had seemed tolerable for at least 40 years." 766 F.2d at 1173.

[3] Those parties whose candidates receive a specified number of votes (½% prior to the statutory amendment, and 2% currently) at the election for Secretary of State qualify for ballot status at the next statewide election. At bar, four parties (Republican, Democratic, Libertarian and American) qualified for the 1984 Presidential ballot as a result of their vote total at the 1982 election. However, this was due to what the Court of Appeals called a "since dispelled ambiguity in the law," 766 F.2d at 1172, allowing qualification for the 1984 ballot under the old ½% standard. It is noteworthy that the Libertarian and American parties each received slightly over ½% at the 1982 election and, had the current requirement been in effect, neither would have been on the 1984 ballot. Thus if not for a "since dispelled ambiguity" the two major parties might well have had a monopoly of the 1984 Presidential ballot.

As distinguished from any previous case that has been reviewed by this Court,* there was a wealth of experience before the Indiana legislature when it quadrupled the signature requirement in March, 1980 that the existing ½% statute was sufficient to avoid an overloaded ballot and thus amply satisfied the State's legitimate interest in regulating the electoral process. As the District Court found (App. A-16), in the half century that the ½% requirement was in effect, only 6 Presidential candidates were on the 1932 ballot, and never more than 5 in the eleven succeeding elections that preceded enactment of the amendment. Since the Republican and Democratic Parties, and possibly other non-petitioning parties, are included in these figures, it is apparent that at most only two or three Presidential candidates gained ballot status at each election through the petitioning process. Hence, adoption of the amendment could not have been prompted by any compelling state interest.

The effect of the quadrupling of the signature requirement was not the avoidance of an overloaded ballot, which had been accomplished by the previous law, but to give a monopoly of the 1984 ballot to the Presidential candidates of those parties which already had ballot status, and to bar minor parties and independent candidates from securing that status by petitioning. As a result of the higher requirement, it appears that 1984

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* The Indiana situation is the first in which the Federal courts have reviewed an increase in the signature requirement as opposed to an existing requirement. The undisputed facts in this case demonstrate that Indiana never had a problem with an overloaded ballot, and this led the Court of Appeals to conclude that the State "has not shown that the protection of this interest," i.e., an overloaded ballot, "required it to raise the petition requirement from .5 to 2 percent." 766 F.2d at 1173. Additionally, this is the first time that the State whose signature requirement was under review did not allow write-in voting, a factor that must weigh heavily in the evaluation of the burden placed upon the electorate. The Court of Appeals so noted: "Thus *Jenness*, where a 5 percent requirement was upheld, can be distinguished from this case by reference to the existence of a write-in alternative, a factor stressed by the Court, see 403 U.S. at 438, 91 S. Ct. at 1974, and absent here." 766 F.2d at 1174.

was the first Presidential election year in the last half-century in which only candidates of established parties appeared on the Indiana general election ballot.

CONCLUSION

Petitioners have demonstrated that the Court of Appeals and other authorities have expressed great uncertainty and confusion about the applicable standard for review in this critical area involving the most fundamental constitutional rights. It may be expected that in the future many states may amend their election laws in a manner that will restrict ballot access, and without a clear statement from this Court, the reviewing courts will not be in a position to conduct an appropriate analysis that preserves "what rank among our most precious freedoms," *Williams v. Rhodes, supra* at 30, while ensuring that the state may satisfy its legitimate interest in regulating the electoral process.

A writ of certiorari should issue to review the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 84-2873

GUS HALL, et al.,

Plaintiffs-Appellants,

v.

EDWIN J. SIMCOX, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division.
No. 84 C 1319—S. Hugh Dillin, *Judge.*

ARGUED APRIL 26, 1985—DECIDED JULY 11, 1985

Before WOOD and POSNER, *Circuit Judges*, and GRAY, *Senior District Judge.**

POSNER, *Circuit Judge.* This suit against Indiana's election officials, brought by the Communist Party, U.S.A., some of its candidates, and some people who would like to vote for its candidates, seeks to enjoin as a violation of the First Amendment an Indiana law that requires minor parties wanting to be listed on the ballot for national or statewide office to submit petitions equal to 2 percent of the number of people who voted in the last election for secretary of state. Ind. Code. § 3-1-11-1. The district court dismissed the suit after a hearing and the Communist Party (as we shall for brevity denote all the plaintiffs) has appealed. Although brought before the 1984

* Hon. William P. Gray of the Central District of California, sitting by designation.

election, which is now some months in the past, the suit is not moot, since the Communist Party hopes to field candidates in future presidential elections. See, e.g., *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969); *Gjertsen v. Board of Election Comm'rs*, 751 F.2d 199, 202 (7th Cir. 1984).

Before 1980 the required percentage for nomination by the petition route was only .5 percent. On March 3 of that year the legislature increased the percentage to 2 percent, effective January 1, 1983. Eight presidential candidates, including the Communist Party's, appeared on the ballot in the November 1980 election, for which the old requirement of .5 percent was still in force. That was the most presidential candidates to have appeared on the Indiana ballot since 1932, when there had been six; since then there had never been more than five, until 1980. In 1984, however, with the new law in effect, there were only four presidential candidates on the Indiana ballot; and there might have been only two except for a since-dispelled ambiguity in the law which allowed two small parties that had polled .5 percent of the vote for secretary of state in the 1982 election, but much less than 2 percent, to get on the ballot. The Communist Party could not use this route (since closed) in 1984 because it had not put up a candidate for secretary of state in 1982. The Party submitted some 9,000 verified signatures, which fell far short of the 35,000 required but would just have made it under the old .5 percent rule. Since Indiana does not permit write-in votes, the Communist Party was completely excluded from the ballot. Incidentally, only very small parties follow the petition route to get on the ballot. A party that polls more than 2 percent but fewer than 10 percent of the votes cast for secretary of state is required to hold a convention to nominate its candidates, while a party that polls 10 percent or more must hold a primary election.

Although, with immaterial exceptions such as the Fifteenth Amendment's prohibition of abridging the right to vote on racial grounds, the federal Constitution does not explicitly create a right to vote, or to stand for

office, or to associate in a political party (political parties were not foreseen when the original Constitution, and the Bill of Rights, were adopted), the Supreme Court in recent years has found such rights to be implicit in various constitutional provisions. Of particular relevance here, the Court has allowed minor parties to challenge under the equal protection clause of the Fourteenth Amendment, or (as here) under the First Amendment (which has of course been held applicable to state action by virtue of the Fourteenth Amendment), provisions of state law that make it harder to get the candidates of such parties on the ballot. See, e.g., *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979). But the Court has not settled on the standard to be applied in ruling on such challenges. Some cases suggest a strict standard: the state must use "the least drastic means" of restricting access to the ballot in pursuit of legitimate state interests—must avoid "overbroad restrictions." *Id.* at 185-86; see also *Williams v. Rhodes*, 393 U.S. 23, 31 (1968). Other cases suggest a looser standard: "the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) (footnote omitted); see also *id.* at 788 n. 9, and cases cited there. The uncertainty about the standard for judging such restrictions has been noted by the Fifth Circuit in *Dart v. Brown*, 717 F.2d 1491, 1501-02 (5th Cir. 1983), and by several commentators. See, e.g., Tribe, American Constitutional Law 783 (1978); Case Comment, 18 Suffolk U. L. Rev. 24, 30 (1984).

If a strict standard were applied to this case, Indiana would be in trouble. While it certainly has an interest in limiting the length of the ballot in order to prevent confusion of voters, it has not shown that the protection of this interest required it to raise the petition requirement from .5 to 2 percent. If the 1984 election can be considered representative in this regard—and only time will tell—the new law will eliminate all minor parties from the presidential ballot. Maybe eight presidential candidates are too many, though Justice Harlan, concurring in *Williams v. Rhodes, supra*, 393 U.S. at 47, thought not; and

maybe the legislators foresaw when they raised the percentage in March 1980 that there would be eight candidates in the fall election. Still, to go from .5 percent all the way to 2 percent in one jump was abrupt, and seems to have brought the number of candidates well below the level that had seemed tolerable for at least 40 years. Since Indiana does not permit write-ins, the ballot as a method of expressing political views may be completely closed to minor parties in Indiana. Compare *Jenness v. Fortson*, 403 U.S. 431, 438 (1971).

The consequences seem difficult to square with a test that requires that the state use the "least drastic means" possible to regulate access to the ballot. But unfortunately for the Communist Party, there is abundant judicial authority, much in the Supreme Court itself and therefore beyond our power to reexamine, for allowing states to set even higher minimum percentages than Indiana has done. See *Storer v. Brown*, 415 U.S. 724, 738, 746 (1974) (5 percent); *Jenness v. Fortson*, *supra* (same); *Populist Party v. Herschler*, 746 F.2d 656, 660 (10th Cir. 1984) (per curiam) (same); *Libertarian Party v. Florida*, 710 F.2d 790 (11th Cir. 1983) (3 percent); *Arutonoff v. Oklahoma State Election Bd.*, 687 F.2d 1375 (10th Cir. 1982) (5 percent); *Beller v. Kirk*, 328 F. Supp. 485 (S.D. Fla. 1970) (3-judge panel) (per curiam), aff'd without opinion under the name of *Beller v. Askew*, 403 U.S. 925 (1971) (3 percent); *Wood v. Putterman*, 316 F. Supp. 646 (D. Md.) (3-judge panel), aff'd without opinion, 400 U.S. 859 (1970) (3 percent); *Populist Party v. Orr*, 595 F. Supp. 760 (S.D. Ind. 1984) (upholding Indiana's 2 percent requirement). In many of these cases, moreover, the base to which the percentage was applied was larger than it is here. In *Jenness*, *Libertarian Party v. Florida*, and *Wood*, the base was all registered voters. Since many registered voters do not actually vote, this is a larger base than actual voters in a particular election, as here. In *Arutunoff* the base was the vote for President or (in off-year elections) for governor; here it is the vote for the secretary of the state, a more obscure officer chosen in an off-year election. If we

compare the 35,000 signatures required by the Indiana law with the 2.2 million votes cast in Indiana in the 1980 presidential election, see U.S. Dept. of Commerce, Bureau of the Census, Statistical Abstract of the United States 1985, at 240 (tab. 403), we see that the Indiana law required signatures equal to only 1.5 percent of the number of votes for President, which is less than a third of the requirement upheld in *Arutunoff*.

Granted, numbers aren't everything. In *McLain v. Meier*, 637 F.2d 1159, 1163-64 (8th Cir. 1980), a requirement of only 15,000 signatures, fewer than in this case though equal to 3.3 percent of the electorate, was struck down—but in conjunction with other restrictions. The regulatory scheme must be considered in its entirety. Thus *Jenness*, where a 5 percent requirement was upheld, can be distinguished from this case by reference to the existence of a write-in alternative, a factor stressed by the Court, see 403 U.S. at 438, and absent here. But in many of the cases we have cited, the difficulty for the minor party of getting on the ballot was greater than in this case, once the practical difficulties of the write-in route are recognized. In *Libertarian Party v. Florida*, for example, which involved a more populous state than Indiana and a signatures requirement computed in terms of registered voters, the state's 3 percent requirement meant that a party had to collect more than 140,000 signatures to get on the ballot, which is four times the number required by Indiana. Even the 1 percent requirement upheld in *American Party of Texas v. White*, 415 U.S. 767, 783 (1974), entailed two-thirds, rather than one-half, as many signatures as Indiana's 2 percent requirement (22,000 versus 35,000). Of course in one sense the more populous the state, the easier it is to get signatures—there is a larger pool to fish from. On this theory only the percentage should matter, a proposition for which *McLain*, which invalidated a requirement of only 15,000 signatures, offers some support. But this overlooks a number of things: it costs money to circulate petitions; the more signatures that are required, the higher the cost is; and minor parties usually are strapped for funds.

The courts may sometimes talk the language of least drastic means but they only strike down ballot-access regulations that are unreasonable, such as Ohio's 15 percent requirement in *Williams v. Rhodes*. Of course the existence of a less restrictive alternative may be relevant to an assessment of reasonableness; one way in which a requirement may be unreasonable is that it is unnecessary in light of another requirement that could be imposed instead. In any event, it seems apparent that the courts do not actually subject ballot-access regulations to the same stringent review to which they subject racial discrimination and regulations of the content of political communications, to give just two examples of strict review. And while it might be possible to reconcile the divergent formulations in the Supreme Court's ballot-access cases on a purely verbal level by drawing an analogy to the semi-strict review that the Court uses in cases involving sexual discrimination alleged to violate the Fourteenth Amendment's equal protection clause, see, e.g., *Kirchberg v. Feenstra*, 450 U.S. 455, 459 (1981), that would suggest a stricter standard than the Court actually applies. See *Dart v. Brown*, *supra*, 717 F.2d at 1498-1504, an exhaustive examination of the issue that reaches the same conclusion as we.

We must follow what the Supreme Court does, and not just what it says, especially when what it says is not altogether consistent from case to case; and while as an original matter a 2 percent requirement in the circumstances of this case might be thought an undue restriction on minor parties' access to the ballot if the test is "the least drastic means," the lawfulness of such a restriction follows *a fortiori* from the decisions upholding higher requirements. In general the danger zone does not even begin until a state goes above 2 percent; and while under the precedents a 2 percent requirement, or in special cases an even smaller requirement, see *Libertarian Party v. Beermann*, 598 F. Supp. 57, 60 (D. Neb. 1984), could be struck down if combined with other restrictions—and some states are ingenious in devising such restrictions, see

No. 84-2873

Blackman, Third Party President? An Analysis of State Election Laws, ch. 4 (1976)—we do not think that barring write-in votes, the only other restriction in Indiana's law that the Communist Party has cited us to, can put the plaintiff over the hump; as a practical matter it is a trivial restriction. Professor Tribe has suggested that the danger zone does not begin till the requirement goes above 5 percent. Tribe, *supra*, at 784. The percentage here is much lower, and is, as we have stressed, applied to votes in an off-year election for a relatively minor post, that of the secretary of state, and hence yields only a modest number of required signatures.

The Communist Party points out, however, that the history of Indiana elections provides a kind of laboratory, unavailable in other states, in which to assess the need for the 2 percent minimum. In states that have always had a 2 or a 3 or a 5 percent requirement it would be speculative to determine the effects of reducing it. A party that knows it can't get 2 percent may not try to get any signatures; hence it will be difficult to say whether, if the 2 percent requirement were relaxed, the number of candidates would increase—and if so to impossible numbers. But we know that in Indiana a much lower requirement, a .5 percent requirement, kept the number of candidates down to eight—indeed, usually to five—and that raising the requirement to 2 percent may have cut it down to two. This is not certain, though. The two small parties that qualified because they got .5 percent in the secretary of state election in 1982 might have been able to collect enough signatures to meet the 2 percent requirement if that had been necessary. In any event, if Indiana is to be penalized for having formerly had a lower requirement, an arbitrary difference will be created among the states. States that had always had high requirements could retain them; states like Indiana that had experimented with lower ones might, depending on the results of the experiments, be frozen into them. Although *Libertarian Party v. Painter*, 741 F.2d 728, 730 (5th Cir. 1984) (per curiam), gives a bit of support to this position, *Arutunoff v. Oklahoma State Election Bd.*, *supra*, 687 F.2d at 1380,

decisively, and we think correctly, rejects it; any other result would create an unacceptable constitutional ratchet.

Weighing the burdens on minor parties and their supporters, actual and potential, along with the benefits of restricting access to the ballot, see *Dart v. Brown*, *supra*, 717 F.2d at 1504, we conclude that Indiana's 2 percent requirement does not violate the Constitution. The 1980 campaign year, which of course began well before March, was marked by great ferment that culminated later in the year in John Anderson's campaign for President as an independent. The legislators could well have foreseen a crowded ballot, and indeed the November ballot was crowded; there were eight presidential candidates on the ballot—an unusual number. The problem of voter confusion cannot be dismissed as trivial, given the advantage that being listed first on the ballot gives a candidate. See *Sangmeister v. Woodard*, 565 F.2d 460 (7th Cir. 1977); Comment, *Protecting the Rationality of Electoral Outcomes: A Challenge to First Amendment Doctrine*, 51 U. Chi. L. Rev. 892, 900-02 (1984). No doubt most voters make up their minds whom they are going to vote for before they get into the voting booth, but some of them either do not, or become confused when they get into the booth; the longer the ballot, the greater the confusion is likely to be. And even if we thought the problem a rather minor one, we would have to bow to the contrary view of the Supreme Court. See, e.g., *Anderson v. Celebrezze*, *supra*, 460 U.S. at 788 n. 9; *Libertarian Party v. White*, *supra*, 415 U.S. at 782 n. 14.

The increase in the required percentage left Indiana with a lower requirement than many other states have, especially when regard is had for the base to which the required percentage is applied, as well as the percentage itself. While no parties met the requirement in 1984, the two small parties that got on the ballot by virtue of their 1982 vote might have been able to get the required number of signatures if necessary. They, and the Communist Party if it tries harder, may well be able to qualify for the 1988 ballot. Thirty-five thousand signatures in a state

of millions of registered voters are not a lot to get; and a party that cannot get that many signatures is not likely to make much of an impression on the electorate even if it gets on the ballot. This is especially so since Indiana does not impose such onerous requirements as that the petitions be distributed geographically in a specified way rather than being concentrated in the areas where the party has its strongest support (such a "distribution" requirement was struck down in the *Beermann* case, *supra*)), or that the petitions contain detailed information about the signers, or that all the signatures must be collected long before the election (as in *McLain*) or within a brief period of time, or the other burdening devices discussed in the Blackman monograph; certainly the Communist Party has pointed to none. Apart from requiring that signers be registered voters and that their signatures be attested—which seem perfectly appropriate requirements—the state imposes only the 2 percent restriction; and it is a lesser restriction than many other states impose, and less than the percentages that the courts regularly uphold.

It is quite possible that the Indiana law ratifies rather than restricts the amount of political competition. It may keep off the ballot just those parties so lacking in electoral appeal that they contribute little to the political diversity of the state or nation. Cf. Comment, *Legal Obstacles to Minority Party Success*, 57 Yale L.J. 1276, 1286 (1948). John Anderson, leading a brand-new political movement, was able to get on every state's ballot in 1980, though it has been argued that the effort to do so debilitated his campaign. See Frampton, *Challenging Restrictive Ballot Access Laws on Behalf of the Independent Candidate*, 10 Rev. Law & Social Change 131 (1980). The Communist Party is an established party, but one with a proven lack of political appeal in the United States, especially in conservative states such as Indiana. It appeared on only 22 states' ballots (and that of the District of Columbia) in 1984.

Finally, there is no evidence that the Indiana legislature acted with an invidious intent in raising the minimum requirement from .5 to 2 percent—that it was hostile to minor parties in general or to the Communist Party or any other party in particular. The district court held an evidentiary hearing at which the Communist Party could have presented evidence of such an intent; it presented none. There is no published legislative history of Indiana laws but the Communist Party could have sought evidence of invidious intent elsewhere if it had thought that a promising route, cf. *Wallace v. Jafree*, 53 U.S.L.W. 4665, 4670-71 (S. Ct. June 4, 1985), which evidently it did not. Granted, limitations on ballot access that are as stringent as found in many of the cases may be motivated less by concern with voter confusion than by the traditional American antipathy to the coalition governments that minor parties precipitate in systems of proportional representation. Although the Supreme Court has allowed states to base restrictions on access to the ballot for state elections on a fear of "unrestrained factionalism," *Storer v. Brown*, *supra*, 415 U.S. at 736, it has questioned this rationale for state restrictions on the ballot for federal elections. See *Anderson v. Celebrezze*, *supra*, 460 U.S. at 804. No state's election laws will measurably affect the danger of destabilizing the national political process through "unrestrained factionalism," and presumably therefore the motivations for such laws lie elsewhere (though one might argue that if the effects are good, motivation should not matter). Moreover, it can be argued that, based on the historical record, minor parties pose little threat to the stability of our political system, and indeed seek access to the ballot not to win elections but to have a more prominent platform from which to preach ideas that may in time enter the political mainstream on the back of one of the major parties. But the overriding purpose of the ballot is electoral, and the states can limit access to the ballot in order to ensure that its electoral purpose is fulfilled. *Georges v. Carney*, 691 F.2d 297, 300 (7th Cir. 1982).

AFFIRMED.

No. 84-2873

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

JUDGMENT — ORAL ARGUMENT

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

July 11, 1984.

Before

HON. HARLINGTON WOOD, JR., *Circuit Judge*
HON. RICHARD A. POSNER, *Circuit Judge*
HON. WILLIAM P. GRAY, *Senior District Judge**

Appeal from the United States District Court
for the Southern District of Indiana,
Indianapolis Division.

No. 84 C 1319

Judge S. Hugh Dillin

GUS HALL, et al.,

Plaintiffs-Appellants.

No. 84-2873

vs.

EDWIN J. SIMCOX, in his official capacity as Secretary of State of Indiana State Election Board, DONALD B. COX and MELVIN REED, Members of the Indiana Election Board,

Defendants-Appellees.

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* Hon. William P. Gray of the Central District of California, sitting by designation.

This cause was heard on the record from the United States District Court for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration wherof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION
NO. IP 84-1319-C

GUS HALL, ANGELA Y. DAVIS, COMMUNIST PARTY, U.S.A., JOSEPH NORRICK, MICHAEL BAYER, ROSCOE PROCTOR,

Plaintiffs,

—vs—

EDWIN J. SIMCOX, Secretary of State of Indiana, LAURIE POTTER CHRISTIE, Executive Director of Indiana State Election Board, DONALD B. COX, Member of Indiana Election Board, MELVIN REED, Member of Indiana Election Board,

Defendants.

MEMORANDUM OF DECISION

This case has come before the Court following a hearing on plaintiffs' complaint for declaratory and injunctive relief. For the following reasons, judgment is entered for the defendants and plaintiffs' complaint is dismissed.

BACKGROUND

In this ballot access case, plaintiffs seek declaratory and injunctive relief alleging that the requirements of Ind. Code § 3-1-11-1, as amended in 1980, violate plaintiffs' rights under the First and Fourteenth Amendments to the United States Constitution. Plaintiffs seek an order declaring Ind. Code § 3-1-11-1 unconstitutional and an order enjoining the defendants from enforcing Ind. Code § 3-1-11-1 and requiring the defendants to place the Communist Party's presidential and vice-presidential candidates on the 1984 Indiana general election ballot.

Indiana Code § 3-1-11-1, as it existed prior to 1980, required parties to poll at least ½% of the total votes cast in the preceeding Indiana Secretary of State election to achieve permanent ballot status for the next general election. If this requirement was not met, the statute provided, as an alternative route to ballot status, that parties or independent candidates could submit petitions containing certified signatures of registered Indiana voters in the amount of ½% of the total votes cast in the preceding Indiana Secretary of State election.

On March 3, 1980, the Indiana General Assembly, by Public Law No. 6, amended Ind. Code § 3-1-11-1 to increase the percentage of votes and signatures required to obtain ballot status, under the alternatives noted, to 2% of the total votes cast in the preceding Secretary of State election. The effective date of the percentage change was set at January 1, 1983.

Due to an ambiguity in the amended statute, the Indiana Attorney General published Official Opinion 83-1 interpreting Ind. Code § 3-1-11-1 to allow parties polling over ½% of the total votes cast in the preceding election of the Secretary of State (in 1982) to be entitled to permanent ballot status for the 1984 general election. The Attorney General, however, found the statute clear in its requirement that petitions submitted on or after January 1, 1983 must contain signatures in the amount of at least 2% of the votes cast in the 1982 Secretary of State election.

Two nonmajor parties, the Libertarian Party and the American Party, ran candidates for Indiana Secretary of State in 1982, polled over ½% of the votes cast, and therefore obtained permanent ballot status for 1984. The plaintiff Communist Party did not run a candidate for Secretary of State in 1982 and, in an attempt to obtain ballot status through the petition alternative, the plaintiffs gathered only 9,063 certified signatures. This amount would have satisfied the ½% requirement but did not meet the 2% requirement of 35,040 signatures.

DISCUSSION

The plaintiffs concede that the 2% requirement, standing alone, is within constitutionally permissible limits. They, nevertheless, contend that the change from ½% to 2% was unnecessary, was intended to specifically exclude them from the ballot, and therefore constitutes an unreasonable restraint on the exercise of their rights under the First and Fourteenth Amendments to the United States Constitution.

That the State has a compelling interest in regulating the number of candidates on the ballot and in protecting the integrity of the election process is well settled. *American Party of Texas v. White*, 415 U.S. 767, 782 n.14, 94 S. Ct. 1296, 1307 n.14, 39 L.Ed.2d 744, 761 n.14 (1974); *Lubin v. Panish*, 415 U.S. 709, 715, 94 S. Ct. 1315, 1319, 39 L.Ed.2d 702, 708 (1974). The State's regulation of the election process, however, imposes a burden on the fundamental rights of individuals to associate for the advancement of political beliefs and the right of qualified voters to cast their votes effectively. *Anderson v. Celebreeze*, 460 U.S. 780, 787, 103 S. Ct. 1564, 1569, 75 L.Ed.2d 547, 557 (1983). Consequently, a State must utilize the least drastic means in restricting access to the ballot to achieve the State's recognized interests. *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 185, 99 S. Ct. 983, 59 L.Ed.2d 230, 242 (1979). The United States Supreme Court, however, has further stated that "[n]evertheless, the state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." *Anderson v. Celebreeze*, 460 U.S. at 788, 103 S. Ct. at 1569-70, 75 L.Ed. 2d. at 557.

The plaintiffs contend that Indiana's ½% requirement was adequate to protect the state's interests and that there was no compelling interest necessitating an increase in the percentage requirement. The record shows, however, that prior to 1980, Indiana traditionally carried four or five presidential candidates on the ballot in each year (one exception was noted that in 1932, six presidential candidates appeared). In 1980, the Indiana ballot carried eight presidential candidates. Anticipating that the ½% requirement was becoming inadequate, the Indiana General

Assembly in March, 1980 passed the amendment increasing the number of votes and signatures needed to achieve a position on the ballot to 2%. This percentage is well below comparable three and five percent signature requirements which have been found to be within constitutional limits. *Storer v. Brown*, 415 U.S. 724, 94 S. Ct. 1274, 39 L.Ed.2d 714 (1974); *Jenness v. Fortson*, 403 U.S. 431, 91 S. Ct. 1970, 29 L.Ed.2d 554 (1971); *Libertarian Party of Florida v. State of Florida*, 710 F.2d 790 (11th Cir. 1983).

Additionally, the effective date of the change to 2% was delayed to January 1, 1983. This delay provided two subsequent legislatures the opportunity to review and amend the percentage requirement, if needed, prior to its effective date and further provided smaller parties and independent candidates ample notice and opportunity to prepare to meet the 2% requirement for the 1984 election. The amendment increasing the degree to which political parties and candidates must show popular support is, therefore, well within established constitutional limitations and is a reasonable means by which the state is protecting the integrity of the election process and regulating the number of candidates on its ballot.

The record further shows that the plaintiffs have not been subjected to invidious discrimination through application of the amended statute. The plaintiffs made no showing that the legislature enacted the amendment with the specific purpose to eliminate the Communist Party and its candidates from the ballot. Rather, the record shows that, as well as imposing a lenient 2% signature requirement and delaying the effectiveness of the percentage change, an ambiguity in the amended statue was resolved in favor of smaller political parties. As noted, parties which ran candidates in the 1982 Secretary of State election and received over ½% of the votes cast have been granted permanent ballot status for the 1984 election. The record further shows that the Communist Party, U.S.A., which has been in existence since 1919 and which appeared on Indiana's 1980 ballot, chose not to run a candidate for Indiana Secretary of State in 1982. There is no indication that the party was prevented in any way from placing a candidate on the 1982

ballot by any conduct of the defendants herein. Thus, the Communist Party opted to forego a substantial alternative route to gain a place on Indiana's 1984 ballot. The plaintiffs cannot now claim that they are denied an alternate means of obtaining ballot status merely because Indiana does not allow "write-in" candidacies, nor can they claim that the statue or its application is discriminatory against them.

In conclusion, Indiana's 2% signature requirement is within constitutional limits, the change increasing the percentage is supported by the record and has been effected in the least restrictive manner under the circumstances, and the defendants have not subjected the plaintiffs to discrimination in applying the statute to deny them a place on the 1984 ballot. Therefore, the plaintiffs' rights under the First and Fourteenth Amendments to the United States Constitution are not unduly burdened by Ind. Code § 3-1-11-1 or its application. Accordingly, plaintiffs complaint is dismissed and judgment is entered for defendants.

Dated this 12th day of October , 1984.

S. Hugh Dillin, Judge

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APPENDIX D

3-1-11-1 [29-3801]. Party and independent candidates' names on ballots — Contents and filing of certificates and petitions of nominations — Party devices — Requirements for candidates. — (a) The state election board and the county election board shall cause to be printed on the respective ballots the names of the candidates nominated by the conventions of any party that cast one-half of one percent [.5%] before January 1, 1983, or two percent [2%] after December 31, 1982, of the total vote of the state of all parties at the last preceding general election, as certified to said state election board or county election board by the presiding officer and secretary of such convention, or by the chairman and secretary of the political party unit holding such convention, or in case of primary election, by the officer legally required to make such certification; and also the names of any candidates, including an independent candidate or a person who does not intend to affiliate with or support the duly chosen candidates of any existing and regular party organization and candidates of any political party not qualified to nominate candidates in a primary, by convention, or by certificate of nomination, for any office when petitioned so to do by electors who are registered at the time of signing, and qualified to vote for such candidates, as follows: For a state officer, or any officer for whom all the electors of the state are entitled to vote, one-half of one percent [.5%] before January 1, 1983, or two percent [2%] after December 31, 1982, of the total vote of all parties cast in the state for secretary of state at the last preceding general election; for a representative in congress from any congressional district, one-half of one percent [.5%] before January 1, 1983, or two percent [2%] after December 31, 1982, of the total vote of all parties cast for secretary of state in such congressional district at the last preceding general election; for a county officer, member of the general assembly, circuit judge, or prosecuting attorney, one-half of one percent [5.%] before January 1, 1983, or two percent [2%] after December 31, 1982, of the total vote of all parties cast for secretary of state in such congressional district at the last preceding general election; for a county officer, member

of the general assembly, circuit judge, or prosecuting attorney, one-half of one percent [.5%] before January 1, 1983, or two percent [2%] after December 31, 1982, of the total vote of all parties cast for secretary of state in such county, legislative district or judicial circuit, as the case may be, at the last preceding general election; for an officer of a township, ward or other division less than a county, one-half of one percent [.5%] before January 1, 1983, or two percent [2%] after December 31, 1982, of the total vote of all parties cast for secretary of state in such township, ward or division, as the case may be, at the last preceding general election. Notwithstanding the precentages listed in this section, a petition under this section is not valid unless it is signed by at least five [5] persons. The signatures to such petition need not be appended to one [1] paper, but no petitioner shall be counted unless at the time of signing the petition he is duly registered and qualified to vote. Each petition must contain the following information.

(1) The signature of the petitioner.

(2) The name of the petitioner legibly printed; and

(3) The residence mailing address of the petitioner.

(b) All candidates nominated by such petition must be seeking an office that serves the same geographic district, division, or unit. Such petition shall state the name and address of each of such candidates; that he is legally qualified to hold such office; that the subscribers desire and are legally registered and qualified to vote for such candidates; and may designate a brief name or title of the party or principle which said candidates represent, together with any simple figure or device by which they shall be designated on the ballots. In order for such petitions to be considered valid by the officer required by law to receive such petitions, each petitioner must be certified to be a registered voter by each clerk of the circuit court or in counties of eighty thousand [80,000] or more in population by the board of registration, whose respective counties have petitioners registered therein, and said certification shall accompany and

be part of each petition paper. The certificate must indicate that each petitioner is eligible to vote for the candidates being nominated by the petition. The petition must be submitted to the clerk of the circuit court or the board of voter registration no sooner than January 1 of the year in which the election will be held, but no later than seventy [70] days prior to the primary election immediately preceding the general election in which the candidate seeks to have his name placed on the ballot. However, candidates for town offices in each town having a population of less than three thousand [3,000] shall file petitions of nomination with the town clerk-tresurer not later than September 1 before the town election.

(c) The certificate of nomination by a convention or primary election shall be in writing, and shall contain the name of each person nominated, his residence and the office for which he is nominated, and shall designate a title for the party or principle which such convention or primary election represents, together with any simple figure or device by which its lists of candidates may be designated on the ballots; said certificates shall be signed by the presiding officer and secretary of such convention, or by the chairman and secretary of the state, county, city or township committee, who shall add to their signatures their respective places of residence, and acknowledge the same before an officer duly authorized to take acknowledgments of deeds. If the certificate of nomination of any state convention shall request that the figure or device selected by such convention be used to designate the candidates of such party on the ballots for all elections throughout the state such figure or device shall be so used until changed by request of a subsequent state convention of the same party. Such device may be the figure of a star, an eagle, a plow, or some appropriate symbol, but the coat of arms or seal of the state or of the United States, the national flag, or any other emblem common to the people at large shall not be used as such device. A certificate of such acknowledgment shall be appended to such instrument. In case of death, resignation or removal of any candidate, subsequent to nomination and within the time for filing certificates and petitions of nomination unless a supplemental certificate or petition of nomination

be filed, the committee of the state, district, county, city or township within such time shall fill such vacancy as provided in this article. In case of a division in any party, and claim by two [2] or more factions to the same party name, or title, or figure, or device, the state election board, or the county election board if the question is pending before the latter board, shall give preference of name to the convention held at the time and place designated in the call of the regularly constituted party authorities, and if the other faction shall present no other party, name, title or device the state election board, or the county election board, shall select a name or title, and place the same before the list of candidates or said faction on the ballot, and select some suitable device to designate its candidates. If two [2] or more conventions be called by authorities claimed to be the rightful authorities of any party, the proper devices to distinguish one [1] faction from the other and print the ballots accordingly: however, if any political party entitled to nominate by convention shall in any case fail to do so, the names of all nominees by petition for any office who shall be designated in their petitions as members of and candidates of such party, shall be printed under the device and title of such party on the ballots, as if nominated by convention. Certificates and petitions of nomination of candidates for offices to be voted for by the electors of the entire state shall be filed with the governor of the state. Certificates and petitions of nomination of candidates for offices to be voted for by electors of any district or division of the state exclusively shall be filed with the person with whom declarations of candidacy must be filed; the secretary of state shall certify each certificate and petition of nomination filed in his office to the appropriate county within seven [7] days of receipt thereof. Candidates for boards of school trustees of community school corporations shall file as specified in IC 20-4-1-26.

(d) The format of petitions and certificates of nomination shall be approved by the state election board. No one may be selected as a candidate by petition of nomination without the consent of such person in writing having been first obtained and duly filed with the proper official with whom certificates and petitions of nomination are required to be filed. Each candidate

nominated by certificate or petition of nomination must satisfy all statutory eligibility requirements for the office for which they are nominated, including statements of economic interest and other prerequisities required to be filed by candidates that participate in primary elections [Acts 1945, ch.208, § 106, p. 680; 1947, ch.120, § 13; 1969, ch.222, § 22; 1973, P.L. 11 § 1; 1975, P.L. 10, § 1; 1977, P.L. 15, § 5; 1980, P.L. 6, § 1; P.L.5-1983, § 5.]

No. 85-589

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Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1985

GUS HALL, *et al.*,

Petitioners

v.

EDWIN J. SIMCOX, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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9 pp

QUESTION PRESENTED

Whether the State of Indiana may raise the number of signatures required on petitions to gain ballot access for a party from one-half percent (1/2%) to two percent (2%) of the total vote cast for Secretary of State at the last preceding general election wherein that office was contested.

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No. 85-589

IN THE

Supreme Court of the United States

October Term, 1985

GUS HALL, *et al.*,

Petitioners

v.

EDWIN J. SIMCOX, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REASON WHY THE WRIT SHOULD NOT ISSUE:

THIS CASE DOES NOT PRESENT A SIGNIFICANT FEDERAL QUESTION

I.

THE INDIANA STATUTE IS CLEARLY CONSTITUTIONAL

Indiana's petition requirement of two percent (2%) of the total vote cast in the most recent preceding election for

Secretary of State is far less onerous than petition requirements which have been approved by other courts, including the United States Supreme Court: Five percent in *Jenness v. Fortson*, 403 U.S. 431 (1971); five percent in *Storer v. Brown*, 415 U.S. 724 (1974); five percent in *Arutonoff v. Oklahoma State Election Board*, 687 F.2d 1375 (10th Cir. 1982); three percent in *Libertarian Party v. Florida*, 710 F.2d 790 (11th Cir. 1983). Indiana's two percent requirement has been upheld in a separate case, *Populist Party v. Orr*, 595 F.Supp. 760 (S.D. Ind. 1984).

Moreover, if one considers the observation in *Storer v. Brown, supra*, 415 U.S. at 730, quoted by Petitioners on pp. 6-7 of their brief, that there is no "litmus-paper test" for separating valid from invidious restrictions, it is clear that Indiana's requirement is even *less* restrictive, relative to the higher limits approved in other cases, than the mere difference in percentage shows. The base to which the percentage is applied is not all registered voters, but actual voters in a particular election. The base is not the vote for President or Governor, but for Secretary of State, as the Court of Appeals noted, "a more obscure officer chosen in an off-year election." Appendix to Petitioner's Brief, page A-4. Moreover, Indiana does not impose onerous geographical restrictions on petitions, nor does it charge a fee for validating the petitions, nor does it require that petitions be collected within a short period of time or long before the election. Indeed, and again as noted by the Court of Appeals, Appendix to Petitioner's Brief, page A-9, Indiana requires only that "signers be registered voters and that their signatures be attested." Thus Indiana's two percent requirement is not only *lower* than requirements in other states which have met with judicial approval, but also exists in conjunction with a complete lack of crippling requirements that existed in some other states.

The fact that Indiana's statute replaced a more lenient provision is irrelevant. "The ultimate test is whether the particular election laws under attack, when considered in

connection with other related election laws, unduly encourage maintenance of the political status quo or are oppressive to a degree that stifles the exercise of first amendment rights." *Arutonoff, supra*, at 687 F.2d 1380. Viewed in the light of harsher requirements in other states which have been upheld by the federal courts, including the United States Supreme Court, Indiana's statute is clearly constitutional.

II.

THE COURT OF APPEALS APPLIED THE CORRECT STANDARD IN UPHOLDING THE INDIANA STATUTE

The Court of Appeals rejected a "strict scrutiny" test for ballot access laws and instead adopted a standard under which "reasonable, nondiscriminatory restrictions" are sustained, citing *Anderson v. Celebrezze*, 460 U.S. 780 (1983). Appendix to Petitioners' Brief, pp. A-3 — A-6. Petitioners, in their Brief at pp. 8-9, cite *Socialist Workers Party v. Secretary of State of Washington*, 765 F.2d 1417 (9th Cir. 1985) and *Bergland v. Harris*, 767 F.2d 1551 (11th Cir. 1985), urging that those cases used a "strict scrutiny" test — "compelling state interest" — and that there is thus a conflict in the circuits over the appropriate test to be used in evaluating ballot access laws. This is incorrect.

Both *Socialist Workers Party* and *Bergland* concluded that such statutes should be analyzed in the fashion of *Anderson v. Celebrezze, supra*, by weighing the character and magnitude of asserted injury against the interests advanced by the State. *Bergland*, 767 F.2d at 1553; *Socialist Workers Party*, 765 F.2d at 1420. However, the Fifth Circuit's analysis of *Anderson, supra*, makes clear that *Anderson* does *not* impose a strict scrutiny test. *Dart v. Brown*, 717 F.2d 1491, 1503 (5th Cir. 1983). Thus use of an *Anderson* analysis does not conflict with the approach of the Seventh Circuit in the instant case.

Petitioners themselves note that this is "the first case in which the federal courts have reviewed an increase in the signature requirement as opposed to an existing requirement." Brief of Petitioners, page 11, fn. 4. They also urge that the question "is likely to arise in other states." Brief of Petitioner, p. 9. If this is the first case, there obviously can be no conflict necessitating review by this Court on certiorari. The better course would be to permit the various circuits to analyze this question as and when it arises. The Petition for Writ of Certiorari should be denied.

CONCLUSION

For the foregoing reasons, Respondents respectfully urge that the writ of certiorari be denied.

Respectfully submitted,

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SUPPLEMENTAL BRIEF FOR PETITIONERS

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SUPPLEMENTAL BRIEF FOR PETITIONERS

On October 15, 1985, subsequent to the filing of the Petition for Certiorari herein, appellants in No. 85-656, *Secretary of State of Washington v. Socialist Workers Party*, filed a jurisdictional statement in support of their appeal from the judgment of the United States Court of Appeals for the Ninth Circuit.

Although the two cases arise under different state statutes and in different factual settings, they present the same constitutional question: whether a state, consistently with the First and Fourteenth Amendments, may amend its election laws by making the requirements for ballot access by minor parties substantially

more burdensome in the absence of any legitimate state interest, substantial or otherwise, for so doing.

At issue in both cases was the appropriate standard for adjudging the constitutionality of the amended statute. In the instant case, the court found (Pet. A-3) that "[if] a strict standard were applied to this case, Indiana would be in trouble." But it rejected the strict standard in favor of the vague one of "reasonableness," in the belief (Pet. A-6) that it was thereby following "what the Supreme Court does, and not just what it says," and on that basis upheld the Indiana amendment. The court in *Socialist Workers Party*, *supra* at 1418, applied what it called "the analytic process" which this Court mandated in *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). Finding (at 1422) that the State of Washington had "failed to present an interest substantial enough to warrant the restraint imposed" on the "protected rights" of ballot access, it invalidated the amended statute as violative of the First and Fourteenth Amendmends.

Petitioners believe that the Court can best resolve this conflict between the Seventh and Ninth Circuits, and what the opinion in the instant case calls (see Pet. 8) "the uncertainty" about the standard for judging restrictions on ballot access, by hearing this case and *Socialist Workers Party*, *supra*, together.

Petitioners therefore suggest that if the Court notes probable jurisdiction in *Socialist Workers Party*, it grant the Petition for Certiorari in the instant case and schedule the two for hearing together.

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